

Ohio and Michigan Law on Postemployment Covenants Not to Compete

BRETT D. PYNNONEN

I. INTRODUCTION

Gone are the days of working for one employer from cradle to grave. The average U.S. employee changes jobs at least three times during his or her working career.¹ With the escalation in job changes, employers are increasingly adding clauses to employee contracts that restrict the employee from competing with the employer after the working relationship is terminated.² A covenant not to compete is often the most crucial clause in an employment contract,³ because, absent such a clause, the employee may generally compete directly with his or her former employer⁴ after the employment relationship is terminated.⁵

Covenants not to compete are typically found in two situations.⁶ First, when a business is sold the buyer will often require that, as part of the sale,

¹ Susan C. Schena, *Thurd of Workers Went to a New Job in '90, Survey Says*, SAN DIEGO BUS. J., May 27, 1991 § 1, at 1.

² Phillip J. Closius & Henry M. Schaffer, *Involuntary Non-Servitude: The Current Judicial Enforcement of Employee Covenants Not to Compete—A Proposal for Reform*, 57 S. CAL. L. REV. 531, 532 (1984) (observing that covenants not to compete are becoming a standard element of most employment contracts).

³ Ronald B. Cooley, *Employment Agreements Provisions Definitions, Duties, Covenants Not to Compete, Assignment After Termination and Severability*, 14 AM. INTEL. PROP. L. ASS'N Q.J. 20 (1986) (alleging that in addition to being the most important clause of an employment agreement, it is also the most difficult to draft); see also Peter Whitmore, *A Statistical Analysis of Noncompetition Clauses in Employment Contracts*, 15 J. CORP. L. 483, 484 n.2 (1990) (arguing that it is now almost malpractice per se not to add such a clause to an employment contract).

⁴ See Harlan M. Blake, *Employment Agreements Not to Compete*, 73 HARV L. REV. 625, 652 (1960) (stating that general knowledge, skill or facility acquired through training or experience while working for an employer accrue solely to the employee, even if the on the job training has been extensive or costly); Robert W. Sikkel & Louis C. Rabaut, *Michigan Takes a New Look at Trade Secrets and Non-Compete Agreements*, 64 MICH. B. J. 1069, 1070 (1985).

⁵ All employees are under a common law duty not to compete with their employers while working for the employer. *E.I. DuPont de Nemours Powder Co. v. Masland*, 244 U.S. 100 (1917).

⁶ Steve D. Shadowen & Kenneth Voytek, *Economic and Critical Analyses of the Law of Covenants Not to Compete*, 72 GEO. L.J. 1425, 1426 (1984).

the seller agree that he or she will not compete with the buyer.⁷ Second, in many employment contracts,⁸ the employer will require an employee to sign an agreement stipulating that the employee will not compete with his or her former employer after the employment relationship is terminated. Recognizing that courts have developed two different standards⁹ for dealing with the two types of covenants, this Article will only examine covenants not to compete in the postemployment setting.

Noncompetition clauses in employment contracts have been the source of litigation for over 500 years.¹⁰ Even after five centuries, however, the sea of information on this topic is best summarized as "vast and vacillating, overlapping and bewildering."¹¹ This confusion is due to the inherent conflict between the basic contract policies on which these covenants rely. The judiciary, in adjudicating disputes involving covenants not to compete, must continually balance one's freedom to contract against the general policy of

⁷ This Article does not address the use of covenants not to compete in the sale of a business.

⁸ Covenants restricting postemployment opportunities in some professions are illegal. See OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108 (1992) (prohibiting a lawyer from "participat[ing] in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits"); see also *Williams v. Hobbs*, 460 N.E.2d 287 (Ohio Ct. App. 1983) (holding that a covenant restraining a physician from competing with his former employer is unreasonable when the physician's services are vital to the community); Paula Berg, *Judicial Enforcement of Covenants Not to Compete Between Physicians: Protecting Doctors' Interests at Patients' Expense*, 45 RUTGERS L. REV. 1 (1992) (contending that covenants not to compete in physician contracts should be invalid because they violate public policy).

⁹ Covenants have been treated differently in these two areas because of the difference in bargaining power. Courts more readily enforce covenants not to compete incident to the sale of a business because a seller of a business has much greater bargaining power than an employee. See C.T. Drechsler, Annotation, *Enforceability of Restrictive Covenant, Ancillary to Employment Contract, as Affected by Duration Restrictions*, 41 A.L.R.2d 15, 30-32 (1955); see also *Alexander & Alexander, Inc. v. Wohlman*, 578 P.2d 530, 538 (Wash. Ct. App. 1978) (explaining that "the covenant might be reasonable . . . as part of the sale of the business, but is unreasonable when applied to employees").

¹⁰ Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV L. REV. 625, 631 (1960) (asserting that the first significant case involving a noncompetition covenant occurred in 1414).

¹¹ *Arthur Murray Dance Studios of Cleveland, Inc. v. Witter*, 105 N.E.2d 685, 687 (Ohio C.P. 1952).

abolishing contractual restraints on trade.¹² The attempt to reconcile these two policies has created an inconsistent body of case law as well as ambiguous state statutes.

Most states, either through common law or statutory decree, have decided that the best way to resolve the inherent policy conflicts within covenants not to compete is to judge the covenant according to the doctrine of "reasonableness."¹³ But as Professor Corbin contends, "reasonableness is no more absolute in character than is justice or morality"¹⁴ In spite of the problems associated with the "reasonableness" standard, however, it appears to be the most effective way to evaluate these agreements.¹⁵

This Article is divided into three parts. Part I examines Ohio law regarding noncompetition clauses. Ohio law on this topic is extensive and more fully developed than most states. Part II explores how Michigan courts adjudicate cases involving noncompetition clauses. In contrast to Ohio, Michigan has minimal law on this topic. The dearth of Michigan law resulted from a statutory prohibition on all noncompetition clauses. Although this ban was lifted in 1985, little case law exists on this topic because the new statute is not retroactive. Because the statute is not retroactive, pre-1985 covenants are still unenforceable. However, litigation regarding covenants not to compete will increase significantly, as post-1985 covenants reach Michigan courts.

Part III concludes this Article by arguing that Michigan should adopt the current Ohio standard for assessing the "reasonableness" of noncompetition clauses. While both Michigan and Ohio enforce "reasonable" noncompetition clauses, Ohio's judicially defined standard has created an effective list of criteria by which to judge whether a covenant is reasonable. Michigan's legislatively defined standard has no such criteria. Michigan should not repeat

¹² Whitmore, *supra* note 3, at 486 (explaining that every time a covenant not to compete clause is litigated the court must weigh one's freedom to contract against the policy abhorring restraint of trade).

¹³ See *id.* at 487-88; see also MICH. COMP. LAWS ANN. § 445.774a (West Supp. 1988) (adopting the rule of "reasonableness"); *Briggs v. Butler*, 45 N.E.2d 757 (Ohio 1942) (establishing the "reasonableness" doctrine in Ohio); David A. Cathcart & Christopher J. Martin, *Contracts with Employees: Covenants Not to Compete and Trade Secrets*, in 1 RESOURCE MATERIAL: LABOR AND EMPLOYMENT LAW 679 (Peter M. Panken ed., 6th ed. 1989).

¹⁴ ARTHUR L. CORBIN, CORBIN ON CONTRACTS (one volume ed.) § 1, at 2 (1952).

¹⁵ See James R. Sprague, *Making Employee Non-Competition Agreements Unenforceable: Triumph of Labor Mobility or Policy Prescription for Disaster? Cases of Ohio and California with Some Practical Suggestions*, 17 CAP. U. L. REV. 391, 407 (1988) (arguing that Ohio's use of the "reasonableness" standard is the best standard available).

the protracted path that Ohio took to create these criteria. Instead, Michigan should apply the current Ohio standard when adjudicating the "reasonableness" of noncompetition clauses.

II. OHIO LAW ON COVENANTS NOT TO COMPETE

A. *The Origin of the "Reasonableness" Standard in Ohio*

The roots of Ohio's current standard regarding noncompetition clauses are grounded in the 1942 case of *Briggs v. Butler*.¹⁶ In *Briggs*, the Ohio Supreme Court adopted the "reasonableness" standard for judging when noncompetition

¹⁶ 45 N.E.2d 757 (Ohio 1942). Thomas Briggs, under the trade name of The Welcome Wagon Service Co., operated an advertising service. Charlotte Butler, at the onset of her employment with Welcome Wagon, signed the following agreement:

Now, therefore, for and in consideration of this employment and the compensation to be earned and paid to the hostess hereunder, the hostess covenants and agrees (which covenant and agreement is the essence of this contract) that she will not, during the term of this employment and for a period of five whole years thereafter, engage, directly or indirectly, for herself, or as a representative or employee of others, in the same kind or similar business, in competition with [The Welcome Wagon Service Co.] in Toledo, Ohio, and/or in any city, town, borough, township or other place in the United States and Canada, in which the company is then engaged in rendering its service.

Id. at 759-60. Butler eventually quit working for Welcome Wagon and started a competing business. Welcome Wagon brought suit to enforce the agreement. The Ohio Supreme Court found the covenant to be reasonable and enforced the covenant as it applied to the City of Toledo but employed the blue pencil doctrine to strike the additional area restrictions. *Id.*; see *infra* notes 28-38 and accompanying text for a discussion of the blue pencil doctrine.

E.P.I. of Cleveland, Inc. v. Basler, 230 N.E.2d 552, 556 (Ohio Ct. App. 1967), provides an interesting perspective on the *Briggs* case:

Briggs is one of a series of cases which have been litigated in various jurisdictions by the Welcome Wagon Hostess Company (Briggs, President) with varying results. The problem is common to all cases. Welcome Wagon hires a hostess in a city to contact newcomers on behalf of merchants in the city, trains her in the methods of acting as a hostess and then sues her on her contract when she sets up a competing company. [The contracts were identical to Butler's contract.] [*Briggs v. Butler*] is criticized in a federal court decision which struck down entirely an identical covenant after comparing several Welcome Wagon cases.

Id. (citing *Welcome Wagon, Inc. v. Morris*, 244 F.2d 693 (4th Cir. 1955)).

clauses should be enforced. For a clause to be reasonable it must meet three criteria: first, it must be necessary to protect the employer in some legitimate business interest; second, the restraint must not be unduly harsh or oppressive on the employee; and third, the restraint must not be injurious to the public.¹⁷

The *Briggs* court's analysis went beyond just determining the reasonableness of the noncompetition clause. In dicta, the court planted the seed for a problem that was to plague employers and the courts for thirty-three years.¹⁸ This seed—that sprouted into a thorny problem—was the *Briggs* court's contention that a clause in a covenant is either reasonable, and consequently valid, or unreasonable, and consequently invalid.¹⁹ According to *Briggs*, a court could not alter the terms of a clause to create a "reasonable" covenant. Consequently, employers were forced to draft weak covenants that often did not fully protect their interests.²⁰ It was better to draft a clause that would assuredly be enforced and protect some interest, as opposed to a clause that fully protected the employer's interests, but ran the risk of being totally invalidated as unreasonable. Courts also experienced difficulty with applying the *Briggs* standard and were forced to strike covenants as too broad, even when the employer had some interests that deserved protection.²¹

After *Briggs*, Ohio law on noncompetition agreements lay silent for ten years until it was reawakened in the seminal case of *Arthur Murray Dance Studios of Cleveland, Inc. v. Witter*.²² Because the parties stipulated that the area and time of the restriction were reasonable,²³ *Arthur Murray* did not help to define what type of limitations are reasonable. The case is a significant

¹⁷ *Briggs*, 45 N.E.2d at 762. See *infra* notes 24–35 and accompanying text (illustrating that, although there are now many subparts within each criterion, these three criteria are still used to assess the validity of noncompetition clauses).

¹⁸ See *infra* note 43 and accompanying text discussing the abolishment of the blue pencil doctrine in Ohio.

¹⁹ *Briggs*, 45 N.E.2d at 763.

²⁰ Sprague, *supra* note 15, at 393. The case intimates more lenient covenants in Ohio may also be a result of the general decrease in the scope of covenants not to compete throughout the country. See Whitmore, *supra* note 3, at 500 (explaining that "current geographic [and] activity restraints usually are written more narrowly than in the past").

²¹ See *E.P.I. of Cleveland, Inc. v. Basler*, 230 N.E.2d 552 (Ohio Ct. App. 1967) (intimating that the employer had some interest that deserved protection, but the terms of the contract were too "definite" and interconnected to allow the court to blue pencil specific clauses and accordingly, the court was forced to strike the entire covenant as unreasonable).

²² 105 N.E.2d 685 (Ohio C.P. 1952).

²³ *Id.* at 691.

noncompetition clause case, however, because Judge Hoover developed the three criteria cited in *Briggs* into a comprehensive, forty-one factor analysis.²⁴ These factors, in part or in their entirety, have been cited by courts across the country in assessing the validity of noncompetition clauses.²⁵

²⁴ *Id.* at 695-99 (requiring courts to examine the following: (1) whether the employer has a protectible interest; (2) whether the covenant is ancillary or incidental to some other transaction; (3) the object of the parties; (4) whether the object is to remove ordinary competition; (5) whether the covenant is meant to discipline the employee; (6) whether the agreement is meant to force the employee from the business; (7) whether the covenant restricts skills the employee acquired through courses provided by the employer; (8) the nature and extent of the employer's business; (9) what the employee did for the employer; (10) how long the employee worked for the employer; (11) whether the employer can easily replace the employee; (12) the extent of the employee's contact with the customers; (13) how many customers the employee knew; (14) whether this employee was the employer's only contact with the customer; (15) whether the employee's contact with the customer was reoccurring; (16) whether the customers would follow the employee; (17) whether the customers would know the employee quit; (18) the distance between previous and prospective employers; (19) whether the employee worked at the customer's premises; (20) whether the employee's work is a route or nonroute type; (21) whether the employee's work involved solicitation; (22) the type of work the employee intends to perform for the rival; (23) whether the employee intends to solicit the employer's customers; (24) whether the employee actually entices customers away; (25) the number of customers that left; (26) whether secret employee lists are involved; (27) whether the employee knows "trade secrets;" (28) whether the employee's new employment uses the acquired trade secrets; (29) the territory the employer's business covers; (30) the territory the employee covered; (31) the area the covenant restricts; (32) whether the agreement restricts an area in which the employer does not do business; (33) whether the agreement bars employment in an area the employee has never worked; (34) whether the restriction applies to urban or rural areas; (35) the duration of the prohibition; (36) the character of the work from which the employee is excluded; (37) the class of persons with which the employee may not deal; (38) the circumstances that require only nonsolicitation; (39) whether fraud, bad faith, or other misconduct was present; (40) whether there was there any actual damage; and (41) how many rivals are there in the area).

Prior to *Arthur Murray*, most courts simply assessed a covenant's validity based on the three criteria cited in *Briggs*.

²⁵ Fourteen states have cited *Arthur Murray* as the correct standard by which to judge the reasonableness of a noncompetition clause. *White Dairy Co. v. Davidson*, 214 So.2d 416, 419 (Ala. 1968); *Amex Distrib. Co. v. Mascari*, 724 P.2d 596, 602 (Ariz. Ct. App. 1986); *Evans Lab., Inc. v. Melder*, 562 S.W.2d 62, 65 (Ark. 1978); *Newark Elec. v. Farber*, 491 So.2d 350, 350 (Fla. Dist. Ct. App. 1986); *Eastern Distrib. Co. v. Flynn*, 567 P.2d 1371, 1376 (Kan. 1977); *Follmer, Rudzewicz & Co.*

In essence, *Arthur Murray* reinforced the basic premises established in *Briggs*—that each case must be decided based on its specific facts and no bright line test can be used in evaluating a covenant's validity.²⁶ In theory, the forty-one criteria list was widely accepted. In practice, however, the vast number of criteria examined by Judge Hoover proved too cumbersome, and most courts subsequent to Judge Hoover's opinion have based their decisions on selected criteria from the list.²⁷

Eight years later, the next significant noncompetition clause case arose. In the 1964 case of *Extine v. Williamson Midwest, Inc.*,²⁸ the Ohio Supreme Court wrestled with the blue pencil rule established in *Briggs*. In *Extine*, the court was asked to determine the validity of a contract clause that restricted the employee from competing with the employer for two years after the termination of the employment relationship.²⁹ The employer argued that either the clause was reasonable or, in the alternative, that the court should reform the clause to what the court thought to be reasonable. Although in line with the growing trend of American case law,³⁰ the latter choice was in direct

v. Kosco, 362 N.W.2d 676, 683 (Mich. 1984); *Prentice v. Rowe*, 324 S.W.2d 457, 461 (Mo. Ct. App. 1959); *Technical Aid Corp. v. Allen*, 591 A.2d 262, 269 (N.H. 1991); *Solaris Indus., Inc. v. Malady*, 264 A.2d 53, 55 (N.J. 1970); *Rem Metals Corp. v. Logan*, 565 P.2d 1080, 1082 (Or. 1977); *Hayes v. Altman*, 266 A.2d 269, 271 (Pa. 1970); *Martin v. Credit Protection Ass'n*, 757 S.W.2d 24, 29 (Tex. Ct. App. 1988); *Richardson v. Paxton Co.*, 127 S.E.2d 113, 117 (Va. Ct. App. 1962).

²⁶ *Arthur Murray*, 105 N.E.2d at 711. ("[A] covenant is not judged standing alone but in relation to the contract and to the particular situation in which it is sought to be enforced . . .").

²⁷ See *infra* notes 53–57 and accompanying text illustrating the reduced number of factors courts examine in considering whether a covenant is reasonable.

²⁸ 200 N.E.2d 297 (Ohio 1964).

²⁹ The *Extine* covenant read as follows:

In consideration of his employment by Employer, Employee agrees that on the termination for any cause whatsoever of his said employment, he will not, within two years after such termination, directly or indirectly, engage in the same or similar or competitive line of business to that now carried on by Employer, either on his own account or through or for or in behalf of any former employee of Employer and that he will not, within said period of employment and two years thereafter, in any way, directly or indirectly, divert or attempt to divert from Employer any business whatsoever and particularly not by influencing or attempting to influence any of the customers with whom he may have had dealings.

Id. at 298.

³⁰ See 17 C.J.S. *Contracts* § 289 (1963).

opposition to the *Briggs* policy of simply striking or enforcing contractual provisions.³¹

The *Extine* court flirted with overruling the blue pencil doctrine of *Briggs*, but in the end, halfheartedly upheld the doctrine based solely on precedent.³² In an attempt to protect both the employer's and the employee's interests, the court separated the *Extine* covenant into four clauses.³³ The first two clauses were struck as unreasonable and the second two clauses were enforced as reasonable restrictions.³⁴ The *Extine* court decided whether each of the four clauses was reasonable based on a ten-factor analysis that the court developed by combining and eliminating the forty-one criteria established by Judge Hoover in *Arthur Murray*.³⁵

By alleging that the clauses were severable, the *Extine* court was able to enforce certain clauses while striking others.³⁶ If the court had decided that the clauses within the covenant were not severable, the entire covenant would have been judged simply as either reasonable or unreasonable.³⁷ Employers

³¹ See *supra* note 19 and accompanying text.

³² *Extine*, 200 N.E.2d at 299 ("For the time being, at least, we believe that the 'blue-pencil' or partial invalidity test should apply.").

³³ The court separated the covenant into the following four clauses: (1) the employee would not engage in the same or similar competitive line of business on his own account; (2) he would not engage in the same or similar line of business for a competitor; (3) he would not divert or attempt to divert business from the employer; and (4) he would not solicit the employer's present customers. *Id.*

³⁴ *Id.* at 300. By striking the first two clauses, the covenant was essentially emasculated: The employee was prevented only from soliciting the employer's present customers.

³⁵ The modified list of factors the *Extine* court employed in deciding whether the covenant was reasonable is as follows: (1) the absence or presence of limitations as to time; (2) the absence or presence of limitations as to space; (3) whether the employee represents the employer's sole contact with the customer; (4) whether the employee possesses trade secrets; (5) whether the covenant seeks to unduly limit competition; (6) whether the covenant seeks to stifle the employee's inherent skill; (7) whether the benefit to the employer is disproportional to the detriment to the employee; (8) whether the employee's talent was developed while working for the employer; (9) whether the covenant acts as a bar to the employee's only means of support; and (10) whether the forbidden employment is only incidental to the main employment. *Id.* at 299.

³⁶ *Id.*

³⁷ See *infra* note 44 for a list of the states that judge the covenant's validity based on the overall reasonableness of the entire covenant.

took careful note of the *Extine* analysis and began drafting noncompetition covenants with detailed and often repetitive subparts.³⁸

In 1970, the Hamilton County Court of Common Pleas presented Ohio employers and employees with a case that had sobering ramifications for both groups. In *Patterson International Corp. v. Herrin*,³⁹ the court upheld a covenant⁴⁰ that restricted an employee from competing with his employer for eighteen months in forty-five states. The case is significant for employees because it is the most far-reaching geographic restriction to be upheld in Ohio. From the employer's standpoint, the case is significant because it reminds employers that enforcing noncompetition clauses is an action in equity. The court decided that the employee had breached the agreement and had derived revenue from the breach, but refused to award the employer compensatory damages because the employer had not paid the employee his last paycheck.⁴¹ Essentially, the employer's "unclean hands" prevented him from recovering the lost revenue.

B. *The Move Toward the Modern Standard*

The modern standard governing the validity of noncompetition clauses in Ohio was established by the Ohio Supreme Court in the 1975 case of *Raimonde v. Van Vlerah*.⁴² In *Raimonde*, the court overruled the thirty-three

³⁸ See *infra* notes 40, 54 illustrating the detailed agreements that developed subsequent to the *Extine* case.

³⁹ 264 N.E.2d 361 (Ohio C.P. 1970).

⁴⁰ The covenant, in relevant part, reads as follows:

EMPLOYEE shall not, during the period of his employment by EMPLOYER and for a period of eighteen (18) months following termination of his employment (whether such termination be with or without cause), either for himself or on behalf of any person, firm, or corporation, directly or indirectly, and in competition with EMPLOYER: (a) solicit, or attempt to divert from EMPLOYER, the business of any of EMPLOYER'S customers or suppliers; or (b) Engage in a business similar to EMPLOYER's in any of the following areas: (45 states listed).

Id. at 362-63 (parentheses in original).

⁴¹ *Patterson*, 264 N.E.2d at 365 (granting the employer an injunction that prevented the employee from continuing to breach the covenant).

⁴² 325 N.E.2d 544 (Ohio 1975). In *Raimonde*, a veterinarian named Van Vlerah signed a noncompetition agreement when he began practicing with Raimonde. The agreement prohibited Van Vlerah from practicing for three years within a thirty mile radius of Defiance, Ohio. Van Vlerah was dismissed after six months and began his

year reign of the *Briggs* blue pencil doctrine by giving courts the power to rewrite a covenant in order to make its terms reasonable.⁴³ Specifically, the court held that "[a] covenant not to compete which imposes unreasonable restriction upon an employee will be enforced to the extent necessary to protect an employer's legitimate interests."⁴⁴

Employers have welcomed this new doctrine with open arms because they are now able to draft covenants that fully protect their interests without fear that a court will completely strike any provisions deemed overbroad or unreasonable. Employees, on the other hand have not been as enthralled with the new doctrine, and contend that by allowing the court to rewrite overbroad covenants, employers will draft severely restrictive contracts knowing that if the court does not approve, the court will simply alter the covenant's terms.⁴⁵ This contention was dismissed by the *Raimonde* court as unfounded because "[m]ost employers who enter contracts do so in good faith, and seek only to protect legitimate interests."⁴⁶ Surprisingly, the *Raimonde* court's response has proven fairly accurate over the last fifteen years; there are no reported cases in which an Ohio court has been presented with patently unreasonable restrictions.⁴⁷

Raimonde is most noted for overruling the blue pencil doctrine but, perhaps more importantly, *Raimonde* also established that injunctive relief⁴⁸

own veterinary practice in Defiance. The court enforced the covenant, but reduced the thirty mile radius to eighteen miles.

⁴³ *Id.* at 547.

⁴⁴ *Id.* Most states follow this approach. See Jeffrey G. Grody, *Partial Enforcement of Post-Employment Restrictive Covenants*, 15 COLUM. J.L. & SOC. PROBS. 181 (1979). A few states, however, refuse to modify the covenant or to selectively blue pencil the covenant: Arizona, Arkansas, Georgia, Maine, Nebraska, South Carolina, Tennessee, Virginia, and Wisconsin. Even fewer states blue pencil covenants: Connecticut, Illinois, Indiana, New York, North Carolina, Pennsylvania, Rhode Island, and West Virginia.

⁴⁵ See, e.g., *Raimonde*, 325 N.E.2d at 547.

⁴⁶ *Id.*

⁴⁷ If an employer creates a patently unreasonable covenant, the court always has the power to strike, rather than rewrite, the covenant. See *Reddy v. Community Health Found. of Man*, 298 S.E.2d 906 (W. Va. 1982) (stating that the court would not rewrite or enforce any portion of a covenant not to compete that the court determines to be "unreasonable" on its face); see also *Fields Found. Ltd. v. Christensen*, 309 N.W.2d 125 (Wis. Ct. App. 1981) (illustrating that the court will not enforce a covenant clause that is oppressive or penal).

⁴⁸ Efficiency requires breach of a covenant to be remedied by injunction rather than damages. Enjoining a breach is the appropriate remedy for addressing a breach because monetary damages are too difficult to compute. Damages are too difficult to compute because:

enforcing the contract should run from the time the judgment is entered, not from when the employment relationship is terminated.⁴⁹ The employee in *Raimonde* argued that even if the three-year covenant was enforced, twenty-eight of the thirty-six months had passed and the covenant could only be enforced for another eight months. The *Raimonde* court wisely rejected this contention, finding that to uphold such a policy would emasculate the clear intent of the injunction. Instead, the court chose to enforce the covenant for thirty-six months from the date of the judgment.⁵⁰

Most covenants restrict the employee for less than two years after the termination of the employment relationship.⁵¹ Even in 1975, as illustrated by *Raimonde*, it generally took longer than two years for the case to reach its final resolution. Enforcing the injunction from the time of the judicial resolution makes even more sense today in light of our clogged judiciary.⁵²

The most recent Ohio case involving a noncompetition clause provides a solid blueprint for how Ohio courts should interpret noncompetition clauses in employment contracts. In *Rogers v. Runfola & Associates*,⁵³ the Ohio Supreme Court was asked to enforce a covenant that enjoined the employees from competing with the employer in the court reporting business for two years within Franklin County.⁵⁴ The court, applying a modified version of the

[T]he court has no "market price" by which to measure the employer's damages. The amount the employee earns by competing is not an appropriate measure because it will have no necessary correlation to the damages sustained by the employer. The decrease in, or the slowed increase in, the employer's profits is not an appropriate measure because of the difficulty of proving a causal relationship between the employee's breach and the amount of the employer's profits.

Shadowen & Voytek, *supra* note 6, at 1432 (footnotes omitted).

⁴⁹ *Raimonde*, 325 N.E.2d at 548.

⁵⁰ One author speculates that a contrary decision would have been as logical as "locking the barn door after the horse has been stolen." Eric J. Wittenberg, *The Practitioner's Guide to Ohio Covenant Not to Compete and Trade Secrets Law in Post-Employment Context*, 18 OHIO N.U. L. REV. 833, 862 (1992) (quoting *Premux, Inc. v. Zappitelli*, 561 F. Supp. 269, 278 (N.D. Ohio 1983)).

⁵¹ Whitmore, *supra* note 3, at 515 (calculating that the average covenant restriction is 24.5 months with an average enforcement of 21.3 months).

⁵² See Andre W. Fegelman, *Judge Aims To Cut Back Court Delays*, CHI. TRIB., May 6, 1992, at C9 (explaining delays of six to seven years are not uncommon before a case reaches trial).

⁵³ 565 N.E.2d 540 (Ohio 1991).

⁵⁴ The covenants contained the following restrictions:

Raimonde standard, rewrote the covenant to what it believed was reasonable. When the court was finished, the covenant restricted the employees for a period of one year and only within the city limits of Columbus.

Rogers reiterated that courts must examine whether a covenant is reasonable with respect to the three criteria established in *Briggs*: first, it must be necessary to protect the employer in some legitimate business interest; second, the restraint must not be unduly harsh or oppressive on the employee; and third, the restraint must not be injurious to the public.⁵⁵ If the court decides that the covenant is unreasonable with respect to any of these three criteria, it is to fashion a reasonable covenant between the employer and the employee. In so doing, the court must consider the following eight factors:

whether the employee represents the sole contact with the customer; whether the employee is possessed with confidential information or trade secrets; whether the covenant seeks to eliminate competition which would be unfair to the employer or merely seeks to eliminate ordinary competition; whether the covenant seeks to stifle the inherent skill and experience of the employee; whether the benefit to the employer is disproportional to the detriment to the employee; whether the covenant operates as a bar to the employee's sole means of support; whether the employee's talent which the employer seeks to suppress was actually developed during the period of employment; and whether the forbidden employment is merely incidental to the main employment.⁵⁶

If blue penciling was still the policy in Ohio, the covenant in *Rogers* would probably have been found unreasonable. Consequently, the entire covenant would have been stricken because the court would not have been able to rewrite the covenant in order to make it reasonable. Instead of striking the covenant in such a manner the court, using the above listed criteria, was better able to efficiently provide equity to both parties.

As in *Raimonde*, the employee argued that because the restrictive period had run, an injunction could not be enforced. The *Rogers* court, relying on

(a) During the term of this Contract and for a period of two (2) years thereafter, [Rogers and Marrone] will not engage in the court reporting and (or) public stenography business as an employee, sole proprietor, independent contractor, partner, joint-venturer or principal at any place within the limits of Franklin County, Ohio, without the express written consent of the Employer.

Id. at 541 n.1.

⁵⁵ *Id.* at 543 (citing *Raimonde v. Van Vlerah*, 325 N.E.2d 544 (Ohio 1975) (first two paragraphs of the syllabus)).

⁵⁶ *Id.* (citing *Raimonde*, 325 N.E.2d at 547).

Raimonde, rejected this contention and enforced the one year covenant starting sixty days from the date of the judgment.⁵⁷

C. The Present Standard

The most significant change in the law involving Ohio noncompetition covenants is the replacement of the blue pencil doctrine with the power of the court to rewrite the covenant in reasonable terms. Yet, after fifty-one years of litigation, it still is not clear what "reasonable" means. Ohio courts have upheld geographic restrictions that canvass almost the entire United States,⁵⁸ but have invalidated, as overbroad, covenants that include only Franklin County.⁵⁹ Paralleling this ambiguity in geographic restrictions is the uncertainty as to how long the covenant may reasonably run. Ohio courts have upheld covenants that last for five years,⁶⁰ yet have invalidated covenants that are only two years long.⁶¹ While seemingly erratic and unpredictable, this is exactly the result the *Briggs* court hoped to achieve when it started down the "reasonable" path.⁶² Each case was to be evaluated on its individual facts and no bright-line test was to be provided. Clearly, no bright-line test is present, but based on *Raimonde* and its progeny, employers and employees now have some indication of the factors the court will examine in making its decision.

III. MICHIGAN LAW ON COVENANTS NOT TO COMPETE

Michigan law surrounding covenants not to compete⁶³ evolved in a much different manner than did its Ohio counterpart. The law in Michigan and Ohio

⁵⁷ *Id.* at 544.

⁵⁸ *Patterson Int'l Corp. v. Herrin*, 264 N.E.2d 361 (Ohio C.P. 1970) (enforcing a covenant that covered 45 states).

⁵⁹ *Rogers v. Runfola & Assocs., Inc.*, 565 N.E.2d 540 (Ohio 1991) (reducing a covenant's geographic scope from Franklin County to the city limits of Columbus).

⁶⁰ *Briggs v. Butler*, 45 N.E.2d 757 (Ohio 1942) (enforcing a five-year covenant); *Toulmin v. Becker*, 124 N.E.2d 778 (Ohio Ct. App. 1954) (enforcing a five-year covenant).

⁶¹ *Rogers*, 565 N.E.2d 540 (enforcing a two-year covenant for only one year).

⁶² *Briggs*, 45 N.E.2d at 761 (contending that the scope of a covenant is "dependent upon the nature and extent of the business and the nature and extent of the service of the employee in connection therewith and other pertinent conditions").

⁶³ Michigan law regarding trade secrets evolved independently from the law addressing covenants not to compete. This Article addresses only covenants not to compete. For a detailed explanation of how Michigan addresses trade secrets, see E. Frank Cornelius, *Supreme Court, Legislature Say "Yes" To Michigan's Trade Secrets*, 64 U. DET. L. REV. 1 (1986).

developed differently primarily because Ohio allowed the courts to decide how to handle the covenants, while Michigan chose to legislatively address the situation.⁶⁴ Judicial control allowed Ohio to take a more dynamic and progressive approach to changes in this area of the law.⁶⁵ Conversely, the Michigan statute governing this area stifled any expansion or change in noncompetition covenants by rendering all such covenants illegal and void.⁶⁶ From the statute's enactment in 1905 to its repeal in 1985,⁶⁷ this area of the law did not develop in Michigan. Legislative reaction is often slower than judicial change and, as a result, Michigan law in this area is in its infancy.

⁶⁴ Other states have also legislatively addressed covenants not to compete with varying degrees of success. *See* ALA. CODE § 8-1-1 (1975); COLO. REV. STAT. § 8-2-113(2) (1973); FLA. STAT. ANN. § 542.339 (West Supp. 1982); HAW. REV. STAT. § 480-4 (1976); LA. REV. STAT. ANN. § 23:921 (West 1964); MICH. COMP. LAWS §§ 28-2-703 to 705 (1981); N.C. GEN. STAT. § 75-2 (1975); N.D. CENT. CODE § 9-08-06 (1975); OKLA. STAT. tit. 15, §§ 217-19 (1971); OR. REV. STAT. § 653.295 (1981-82); S.D. CODIFIED LAWS ANN. §§ 53-9-8 to 11 (1980); WIS. STAT. ANN. § 103.465 (West 1974).

⁶⁵ *See* Sprague, *supra* note 15, at 407 (alleging that Ohio's "reasonableness" doctrine has created a thorough and practical solution to cases involving noncompetition clauses).

⁶⁶ MICH. COMP. LAWS § 445.761 (1979), *repealed by* 1984 MICH. PUB. ACTS 274 (codified at MICH. COMP. LAWS ANN. §§ 445.771 to .788 (West Supp. 1988)) ("All agreements and contracts by which any person, co-partnership or corporation promises or agrees not to engage in an avocation, employment, pursuit, trade, profession or business, whether reasonable or unreasonable, partial or general, limited or unlimited, are hereby declared to be against public policy and are illegal and void.").

There were three key exceptions to this general prohibition. First, there was an exception that allowed a seller of a business to contractually limit himself or herself from competing with the purchaser of his or her previous business. This exception was created through two statutory provisions: First, § 445.731 provided that "nothing in this act shall be construed to impair or invalidate agreements or contracts known to the common law and in equity as those relating to good will of trade." Second, § 445.766 stated that "[t]his act shall not apply to any contract mentioned in this act, nor in restraint of trade where the only object of restraint imposed by the contract is to protect the vendee, or transferee" The second exception to the general prohibition allowed employers to restrict their employees from disclosing "route lists" for 90 days after their employment terminated. *Id.* § 445.766. The third exception allowed an employer to protect trade secrets. *See supra* note 63.

⁶⁷ Section 445.761 was repealed by the Michigan Antitrust Reform Act. MICH. COMP. LAWS ANN. § 445.771 to .788 (West Supp. 1988).

In 1985, the legislature passed the Michigan Antitrust Reform Act ("MARA"),⁶⁸ which repealed the 1905 statute prohibiting noncompetition covenants. Because of the confusion surrounding whether postemployment covenants not to compete were legal after 1985, the MARA was amended two years later to specifically allow courts to enforce reasonable covenants not to compete.⁶⁹ To be enforced, consequently, the covenant must be reasonable as to duration, geographical area, and type of employment or line of business.⁷⁰ If the covenant is found to be unreasonable, the court may rewrite the covenant in order to make it reasonable. The statute, however, only applies to covenants written after 1985. Thus, by statutory decree, Michigan ended the eighty years of silence in this area. Unlike Ohio, however, there is no indication as to what factors the court will consider in making the reasonableness determination.⁷¹

Prior to 1985, it was easy for Michigan attorneys to deal with covenants not to compete: all such covenants were illegal and void. Unless the court considered the information the employee possessed to be a trade secret, the employee had an unrestricted choice of where he went to work and with whom he competed. There was no problem of what to do with overbroad covenants. As Michigan Supreme Court Chief Justice Williams wrote in his dissent in *Woodward v. Cadillac Overall Supply Co.*, "[T]here is no authority in

⁶⁸ 1984 MICH. PUB. ACTS 274 (codified as amended at MICH. COMP. LAWS ANN. §§ 445.771 to .788 (West Supp. 1988)).

⁶⁹ MICH. COMP. LAWS ANN. § 445.774a. (West Supp. 1988) This subsection provides as follows:

(1) An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interest and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.

(2) This section shall apply to covenants and agreements which are entered into after March 29, 1985.

Id.

⁷⁰ See *id.* for the specific language of the statute.

⁷¹ See Sikkell & Rabaut, *supra* note 4, at 1070 (questioning whether Michigan will enforce *any* noncompetition covenants and, if so, what standard of review will be applied).

Michigan as to the treatment of overbroad covenants not to compete ancillary to an employment contract partially for the simple reason that any such covenant, no matter how limited, has been illegal . . . since 1905."⁷² With the 1985 statutory allowance for reasonable covenants, these covenants will now be a source of potential litigation.

The present statute allows for protection of an employer's legitimate business interest. An important question that the statute does not clearly answer, however, is what type of interests are protectible. The original version of House Bill 4072,⁷³ on which the current statute regarding employment covenants is based, provided a more detailed explanation of exactly what type of interests the employer could protect.⁷⁴ The original Bill allowed an employer to protect trade secrets and to protect the employee from using skills that are special, unique, or extraordinary to the employer's business. This Bill was a conglomeration of New York's statute on covenants not to compete⁷⁵ and the *Restatement of Contracts*.⁷⁶ One author speculates that the original

⁷² Woodward v. Cadillac Overall Supply Co., 240 N.W.2d 710, 718 (Mich. 1976).

⁷³ Mich. H.B. 4072, 84th Leg., Reg. Sess. (1987).

⁷⁴ House Bill 4072 read as follows:

(1) An employer shall not obtain from any employee an agreement or covenant, express or implied, which prohibits the employee from engaging in any employment or line of business after the termination of the employment relationship unless 1 or more of the following apply to the covenant or agreement:

(a) Its purpose is to prohibit the disclosure of trade secrets.

(b) Its purpose is to prohibit the employee from soliciting the clients or customers of the employer for not more than ninety days after termination of the employment relationship.

(c) Its contents pertain to employee services which are special, unique, or extraordinary

(2) As used in this section, an employee's services are "special, unique, or extraordinary" if the employee participates in policy-making decisions and has had access to corporate planning material or confidential employment materials.

Id.

⁷⁵ E. Frank Cornelius, *Michigan's Law of Trade Secrets and Covenants Not to Compete: Chapter Two*, 66 U. DET. L. REV. 33, 37 (1988).

⁷⁶ *Id.* at 38.

form of this Bill was altered because it was too broad in some respects and too narrow in others.⁷⁷ It was allegedly too broad in its scope with the special, unique, or extraordinary language and too narrow in the number of protectible interests.⁷⁸ Although the legislature enacted the law, it left to the courts the job of defining what interests an employer may protect.

A key question is whether an employer's investment in employee training is a protectible interest. Neither the statute nor case law provides an answer to this question. Various authors have reached divergent answers by interpreting the statute's legislative history in two different ways. One possible answer relies on the assumption that the Michigan legislature refused to enact House Bill 4072 because the listing of specific protectible interests was too restrictive.⁷⁹ If one relies on this assumption, employee training is probably a protectible interest. The second possible answer relies on the premise that, although the legislature refused to enact the original Bill as presented, it did not intend to create a broad interpretation of the type of interest that is protectible.⁸⁰ This premise is based on the "profoundly negative effect which covenants not to compete can have on employees in particular and on business and commerce in general."⁸¹ If one relies on the second premise, employee training is probably not a protectible interest.⁸² This issue has not been addressed by a Michigan court and either interpretation is equally tenable.

Litigation surrounding covenants not to compete should begin to increase in Michigan. It is now established that the MARA does not apply retroactively to covenants entered into prior to March 29, 1985. Although one federal district court applied the MARA statute retroactively,⁸³ all Michigan case law

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See Michael F. Golab, *Employee Non-Competition Agreements*, 67 MICH. B. J. 388, 389 (1988) (contending that the court will balance and respect an employer's investment in employee training and other proprietary information that does not qualify as a trade secret).

⁸⁰ See Cornelius, *supra* note 75, at 41-42 (alleging that it is "doubtful that an expansive interpretation of 'an employer's reasonable business interests' was intended" to include employee training).

⁸¹ *Id.* at 41.

⁸² This contention is also strengthened by *Kubik, Inc. v. Hull*, 224 N.W.2d 80, 96 (Mich. Ct. App. 1974) (arguing that uniqueness is not sufficient to create a trade secret). Although *Kubik* dealt with trade secrets and was decided prior to 1985, when noncompetition covenants were invalid, it still provides a valuable indication of how Michigan courts will examine employee training.

⁸³ *Thompson Recruitment Advertising, Inc. v. Wedes*, 651 F. Supp. 107, 109 (E.D. Mich. 1986) (applying the law in effect at the time the cause of action arose).

indicates that because the statute is substantive rather than remedial,⁸⁴ it does not apply to any covenants entered into prior to its enactment. The most recent federal case has followed this line of Michigan case law and has denied retroactive application of the MARA.⁸⁵

Case law prior to 1905 may provide some indication as to what type of factors Michigan courts will consider when assessing whether a covenant is reasonable. Pre-1905 case law identifies four factors that must be examined in judging whether a covenant is reasonable: first, whether the agreement is for a "just and honest purpose;" second, whether the agreement seeks to protect a legitimate business interest; third, whether the agreement is reasonable between the parties; and fourth, whether the agreement is injurious to the public.⁸⁶ While these factors date back to the nineteenth century, they are still cited in current court opinions.⁸⁷ Therefore, it is reasonable to believe that they will be incorporated into the assessment of whether a covenant is reasonable.

To date, only one case involving a post-1985 noncompetition covenant has reached the courts.⁸⁸ In *Robert Half International, Inc. v. Van Steenis*, an

⁸⁴ See *Compton v. Lepack*, 397 N.W.2d 311 (Mich. Ct. App. 1986):

When an agreement or contract is entered into in violation of the statute, repeal of that statute does not make the agreement valid because the Legislature cannot validate a contract which never had a legal existence; [the only exceptions to this rule are if the repealing statute] expressly or impliedly states that it validates previously invalid agreements or if the repealed statute affects only the remedy.

Id. at 316.

See also *Cardiology Assocs. v. Zenka*, 400 N.W.2d 606 (Mich. Ct. App. 1985) (contending that the law existing at the time the covenant was entered into was applicable to determine the validity of the covenant).

⁸⁵ *Shipley Co. v. Clark*, 728 F. Supp. 818 (D. Mass. 1990) (refusing to transfer a case from Massachusetts to Michigan because Michigan's public policy against enforcing pre-1985 noncompetition would render the covenant invalid).

⁸⁶ *Hubbard v. Miller*, 27 Mich. 15, 19 (1873).

⁸⁷ See *Follmer, Rudzewicz & Co. v. Kosco*, 362 N.W.2d 676, 684 (Mich. 1984) (citing *Hubbard* as the correct standard by which the court would judge the reasonableness of a covenant).

⁸⁸ *Robert Half Int'l, Inc. v. Van Steenis*, 784 F. Supp. 1263 (E.D. Mich. 1991). In *Robert Half*, the employer was an employment recruitment agency with various offices in the Detroit and Ann Arbor area. When Van Steenis began working for Robert Half in 1988, he signed a noncompetition agreement that restricted him, upon termination of the employment relationship, from working for one year within a fifty-mile radius of three of Robert Half's offices. In 1991, Van Steenis quit working for Robert Half and immediately began to work for a competing recruitment agency. The

employer sought to enforce a noncompetition covenant that restricted a former employee from working for one year within a fifty-mile radius of three of the employer's offices.⁸⁹ In reaching its decision, the court did not employ or list any factors which could be used by future courts in deciding other noncompetition clause cases. The court simply stated that, based on the facts of this case, fifty miles and one year are reasonable.

While *Robert Half* embodies the spirit of *Briggs*⁹⁰—that each case must be evaluated on its individual facts and no bright-line test is available—it does little to help define what restrictions are reasonable. In essence, this case restates section 445.774a of the MARA and then declares that the noncompetition clause is reasonable. Employers and the courts still have little indication of what factors to consider when drafting and adjudicating noncompetition clauses.

By enacting the MARA and its subsequent amendment, the Michigan legislature acknowledged that employment conditions have changed markedly since 1905 and that the law must adapt to this change.⁹¹ While MARA was a step in the right direction, it still will be many years before employers will know what provisions will be considered reasonable.

competing agency was located across the street from Robert Half's office in Troy, Michigan. Robert Half filed suit against Van Steenis seeking specific enforcement of the noncompetition agreement. *Id.* at 1264–70.

⁸⁹ Robert Half alleged that Van Steenis not only breached the noncompetition covenant, but also used trade secrets—confidential books, papers, and appointment calendars—that he had taken with him when he quit working for Robert Half. *Id.* Because of the second allegation, this case could have been decided as a trade secret case without the need to interpret the noncompetition covenant. As noted earlier, Michigan has consistently given the employer greater protection when trade secrets are involved. See Cornelius, *supra* note 63.

⁹⁰ See *supra* notes 16–19 and accompanying text for a discussion of the *Briggs* case.

⁹¹ As the court noted, however, in *Kelsey-Hayes Co. v. Maleki*, 765 F. Supp 402 (E.D. Mich. 1991), “[t]he advance made by the 1987 enactment clearly does not remove such covenants from disfavored status, and narrowly limits them to ‘reasonableness’ in protecting only a competitive interest, duration, geographic area, and type of employment.” *Id.* at 406. In *Kelsey*, the court refused to enforce a covenant not to compete because the covenant sought to restrict only normal competition. The court held that an employer's legitimate business interests “must be something greater than mere competition, because a prohibition of all competition is in restraint of trade” *Id.* at 407.

IV. WHY MICHIGAN SHOULD ADOPT THE OHIO STANDARD

While Michigan draws from a statutorily defined standard, and Ohio draws from a judicially created standard, there should be significant similarity in the results. Michigan law is just beginning to evolve in this area because, while Ohio law developed slowly and methodically from *Briggs* to *Rogers*, Michigan law, until 1985, lay dormant under its legislatively imposed blanket. As Michigan law awakens, it should adopt the lessons learned by Ohio.

Michigan should adopt the present factors that Ohio applies in assessing whether noncompetition clauses are reasonable. Michigan, in essence, has already started down the same path Ohio took in the 1942 case of *Briggs v. Butler*.⁹² Michigan embarked down the *Briggs* path in the 1984 case of *Follmer, Rudzewicz & Co. v. Kosco*.⁹³ In assessing the validity of a contract provision similar to a covenant not to compete,⁹⁴ the Michigan Supreme Court held that the restraint was reasonable based on the same three criteria *Briggs* applied fifty years ago.⁹⁵ Through trial and error, embodied in fifty years of case law, Ohio courts have modified the *Briggs* standard to create the clear,

⁹² In *Follmer, Rudzewicz & Co. v. Kosco*, 362 N.W.2d 676 (Mich. 1984), the Michigan Supreme Court decided the validity of a contract clause based on whether the agreement protected a valid business interest of the employer, whether the agreement was unduly burdensome on the employee, and whether the agreement was injurious to the public. *Id.* at 683. The *Follmer* court cited *Hubbard v. Miller*, 27 Mich. 15, 19 (1873), as the source of this standard, but these are the same three interests cited in *Briggs*. See *supra* notes 16-17 and accompanying text for the standard used in *Briggs*.

⁹³ 362 N.W.2d 676. *Follmer* dealt with two cases consolidated on appeal. The court's reasoning applies equally to both cases.

⁹⁴ The *Follmer* provision reads as follows:

If, at any time within three (3) years after the termination or expiration hereof, Employee directly or indirectly services any client of Employer, he shall immediately purchase from Employer the goodwill associated with such client. In view of the difficulty in evaluating goodwill, it shall be measured by [a certain formula], but in no event, less than Two Thousand (\$2,000) Dollars for each such client.

Id. at 678 n.1.

The Michigan Supreme Court held that the *Follmer* clause was not a covenant not to compete, thereby not violating the statute that prohibited such agreements. The court reasoned that the agreement did not prevent the employee "from engaging in his chosen profession" nor "from openly and notoriously competing with plaintiff." *Id.* at 678.

⁹⁵ See *supra* note 17 and accompanying text for the three criteria cited in *Briggs*.

concise standard applied in *Rogers*.⁹⁶ In deciding whether a covenant is reasonable, Michigan should not labor through fifty years of case law, but should simply adopt the *Rogers* standard.

Adopting the current Ohio standard would be logical, therefore, because both states allege to apply the "reasonable" standard, neither blue pencil unreasonable clauses, and both allow the court to rewrite covenants that are deemed unreasonable. If Michigan courts adopt the current Ohio standard for judging whether a noncompetition clause is reasonable, employers and employees would have a clear indication of the factors the court would use in assessing a covenant's validity. The benefits of this knowledge would be twofold. First, employers could draft noncompetition clauses that would not be unduly burdensome on the employee, yet would protect the employer's entire interests. Second, Michigan courts could avoid the multitude of cases that were necessary to form the current Ohio standard.

Michigan law regarding covenants not to compete will continue to evolve as employment agreements entered into after 1985 are brought before the Michigan courts. As such cases come to trial, Michigan courts will be forced to define what is "reasonable." The most logical approach is for Michigan to adopt the definition of "reasonable" created through Ohio's case law

⁹⁶ See *supra* note 56 and accompanying text.

